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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1958

No. 12, Original

STATE OF CALIFORNIA,
Plaintiff,

vs.

STATE OF WASHINGTON,
Defendant.

PETITION FOR REHEARING ON THE ORDER OF THE COURT DENYING LEAVE TO FILE THE COMPLAINT HEREIN.

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		Page
1.	The court has denied leave to file on substantive, rather than jurisdictional grounds	2
2.	The court has previously decided applications to invoke its original jurisdiction exclusively on the basis of jurisdictional considerations. California has relied upon the established practice of the court	3
3.	The prejudice resulting from the order	8
4.	The substantive questions are so important they should not be decided without further hearing	9
5.	Conclusion	11

Table of Authorities Cited

Cases	Pages
Alabama v. Texas, 347 U. S. 272 (1954)	4
Arizona v. California, 298 U. S. 558 (1936)	4
Arkansas v. Texas, 346 U. S. 368 (1953)	3
Carter v. Virginia, 321 U. S. 131 (1944)	10
Georgia v. Pennsylvania R. Co., 324 U. S. 439 (1945)	3, 5, 8
Georgia v. Tennessee Copper Co., 206 U. S. 230 (1907)	3
Kansas v. United States, 204 U. S. 331 (1907)	4
Louisiana v. Cummins, 314 U. S. 580 (1941)	3
Louisiana v. Texas, 176 U. S. 1 (1900)	3, 4

Pages

Massachusetts v. Mellon, 262 U. S. 447 (1923) 3, 4

Massachusetts v. Missouri, 308 U. S. 1 (1939) 3, 5, 8

Missouri v. Illinois, 180 U. S. 208 (1901) 3, 4

Monaco v. Mississippi, 292 U. S. 313 (1934) 4

Oklahoma v. Atchison T. & S.F. R. Co., 220 U. S. 277 (1911) 3

Oklahoma v. Cook, 304 U. S. 387 (1938) 3

Oregon v. Hitchcock, 202 U. S. 60 (1906) 4, 5

State Board of Equalization of the State of California, et al. v. Young's Market Company, et al., 229 U. S. 59 ..... 9, 10

Texas v. I.C.C., 258 U. S. 158 (1922) 3

United States v. West Virginia, 295 U. S. 463 (1935) 3

Constitutions

United States Constitution, Twenty-first Amendment 2, 6, 10

Codes

28 U.S.C.:
Section 1251(a)(1) 9
Section 2281 9

Rules

Rules on Appeal, Rule 9 5

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PETITION FOR REHEARING ON THE ORDER OF THE COURT DENYING LEAVE TO FILE THE COMPLAINT HEREIN.

The State of California respectfully asks the Court to reconsider its Order dated November 10, 1958, denying California's Motion for Leave to File a Complaint herein, and to grant California an opportunity to brief and advise the Court concerning the merits of the substantive issues raised by the Complaint.

The ground for this request is that the Court, in basing its denial of leave to file upon substantive reasons which go to the merits, rather than upon juris-

dictional considerations, has unexpectedly departed from its long-established practice in deciding motions in similar cases, with resulting procedural prejudice to California. In short, the Court has determined the substantive law of the case in advance of the filing of the Complaint, and without having received the brief and argument of California in support of the merits of its case.

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1. **THE COURT HAS DENIED LEAVE TO FILE ON SUBSTANTIVE, RATHER THAN JURISDICTIONAL GROUNDS.**

On November 10, 1958, the Court entered the following Order herein:

> "Per Curiam: The motion for leave to file a bill of complaint is denied. U. S. Const. Amend. XXI, Sec. 2; *Indianapolis Brewing Co. v. Liquor Control Commission,* 305 U. S. 391; *Joseph S. Finch & Co. v. McKittrick,* 305 U. S. 395; *Mahoney v. Joseph Triner Corp.,* 304 U. S. 401; *State Board of California v. Young's Market Co.,* 299 U. S. 59."

The authorities cited do not deal with the original jurisdiction of the Court or the manner of its exercise. None of the cases cited arose in the original jurisdiction of the Court. None of them have any bearing upon the questions previously considered by the Court in deciding a motion by a state, as plaintiff, seeking to invoke the original jurisdiction.

The four cases cited involved only the application and construction of the Twenty-first Amendment.

They relate exclusively to the substantive questions involved in the ultimate disposition of the case on its merits.

With deference to the Court's undoubted authority to summarily dispose of the case, we submit that the effect of the Court's Order is to determine the substantive law of the case without California having its day in court to brief and argue these questions for the Court's consideration.

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2. THE COURT HAS PREVIOUSLY DECIDED APPLICATIONS TO INVOKE ITS ORIGINAL JURISDICTION EXCLUSIVELY ON THE BASIS OF JURISDICTIONAL CONSIDERATIONS. CALIFORNIA HAS RELIED UPON THE ESTABLISHED PRACTICE OF THE COURT.

So far as can be ascertained from the reported decisions, the Court has previously decided applications to invoke its original jurisdiction on the basis of jurisdictional considerations, such as the standing of the plaintiff state to sue,[1] the availability of an alternative trial forum,[2] the existence of a controversy which is judicially cognizable,[3] and lack of sovereign consent

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[1] *Missouri v. Illinois*, 180 U. S. 208 [1901].
Georgia v. Tennessee Copper Co., 206 U. S. 230 [1907].
Oklahoma v. Cook, 304 U. S. 387 [1938].
Georgia v. Pennsylvania R. Co., 324 U. S. 439 [1945].
Arkansas v. Texas, 346 U. S. 368 [1953].

[2] *Massachusetts v. Missouri*, 308 U. S. 1 [1939].
Louisiana v. Cummins, 314 U. S. 580 [1941].
Texas v. I.C.C., 258 U. S. 158 [1922].

[3] *Louisiana v. Texas*, 176 U. S. 1 [1900].
Massachusetts v. Mellon, 262 U. S. 447 [1923].
Oklahoma v. Atchison T. & S.F. R. Co., 220 U. S. 277 [1911].
United States v. West Virginia, 295 U. S. 463 [1935].
Massachusetts v. Missouri, 308 U. S. 1 [1939].

to be sued.[4] *We have not found any prior case in the original jurisdiction in which leave to file was denied solely because of the Court's determination at that time of the substantive questions involved in the consideration of the merits of such case.*[5]

In this case California has been necessarily guided by the practice which the Court has molded over the years in controlling the exercise of its original jurisdiction. That practice has changed in one respect which is significant here. No longer is the application of a plaintiff state to invoke the original jurisdiction "usually granted as of course" (*Kansas v. United States,* 204 U. S. 331, 337 [1907]), the question of jurisdiction being reserved and subsequently determined after the complaint was filed, either on motion to dismiss (*Kansas v. United States, supra*) or on demurrer (*Louisiana v. Texas, supra* [1900]; *Missouri v. Illinois, supra* [1901]). Under this former practice, the complaint having been filed, it was, of course, subject to attack for want of legal merit as

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[4] *Oregon v. Hitchcock,* 202 U. S. 60 [1906].
Monaco v. Mississippi, 292 U. S. 313 [1934].
Arizona v. California, 298 U. S. 558 [1936] (Indispensable party not within Court's jurisdiction).

[5] *Alabama v. Texas,* 347 U. S. 272 [1954] is hardly an exception. The Court denied leave to file because the case involved the disposition of property of the United States. After thorough briefing on the questions presented by the complaint, the Court held that the power of disposal of federal property is entrusted to Congress "without limitation" and that "it is not for the courts to say" how it should be exercised. This is the same as holding that the controversy was political in nature and was not a justiciable controversy between the states in which the Court would have jurisdiction to grant the relief prayed for. Cf. *Massachusetts v. Mellon,* 262 U. S. 447. Thus the question of the Court's jurisdiction was inseparable from the principal question presented by the complaint.

well as for want of jurisdiction. Even then, however, the Court refused to consider substantive matters until jurisdictional questions had been settled. "The question of jurisdiction, of course, precedes any inquiry into the merits." (*Oregon v. Hitchcock,* 202 U. S. 60, 68 [1906]).

In recent years, the Court has understandably become increasingly concerned with the need "to protect this Court from an abuse of the opportunity to resort to its original jurisdiction" (*Massachusetts v. Missouri, supra,* 308 U. S. at 19 [1939]). Where prejudice to substantive rights would not result, it has considered the availability of an alternative trial forum (*Massachusetts v. Missouri, supra,* 308 U. S. at 18-20; *Georgia v. Pennsylvania R. Co., supra,* 324 U. S. at 464 [1945]) in order to minimize interference "with the discharge of our ever increasing appellate duties" and to achieve "a more efficient administration of justice" (Stone, C.J., dissenting in *Georgia v. Pennsylvania R. Co., supra,* 324 U. S. at 470). Consistent with these concerns, the Court now requires that its consent be given to the invocation of its original jurisdiction prior to the filing of the complaint (Rule 9).

First things should come first, in the administration of justice as well as in other affairs. The time and energy of the Court, and of all interested parties as well, can best be used by determining the jurisdiction of the Court in an original proceeding before proceeding to a consideration of the merits. This, indeed, has been the course and practice followed by the

Court in the years last past. Hence, it is not surprising that, so far as can be determined from the reported cases, the Court has consistently given or withheld its consent to filing solely on the basis of jurisdictional, and not substantive considerations.

This practice is especially suited to a case such as the instant case, where the issues are not factual but consist solely of questions of law. To fully brief and argue complex questions of constitutional interpretation in connection with a Motion for Leave to File would be to submit the entire case in advance of the filing of the complaint. Such an anachronism would defeat the objectives of the Court in requiring, under the present practice, that its consent be obtained to the actual filing of the complaint.[8] The rationale of the present practice bears close resemblance to that underlying the common law plea to the jurisdiction: both are calculated to raise the jurisdictional issue in advance of any other proceedings.

These considerations were controlling in the preparation of California's briefs and argument in support of its Motion for Leave to File. Accordingly, California addressed itself primarily to the applicable jurisdictional considerations which the Court in prior cases has regarded as significant: plaintiff's standing to sue (Calif. Brief, pp. 11-30), suit against defendant

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[8]On the present state of the record, with California's Complaint not yet filed, there is no question before the Court to which the Twenty-first Amendment or the decisions cited in support of its Order have any relevance whatever. The authorities cited relate to the merits of a case which is not yet before the Court for determination.

in its official capacity as a state (p. 31), non-availability of an alternative forum in view of the exclusive nature of the Court's original jurisdiction over controversies between two states (pp. 32-34), non-existence of private litigation raising the same issues (pp. 35-36). The substantive issues were delineated to establish the existence of a justiciable controversy between the parties (pp. 36-51). That California did not even attempt to fully brief, analyze, or argue the substantive law of the case is apparent on the face of the California Brief. Consistently the Brief outlines, in future tense, the position that *will be taken* by California, in the event jurisdiction of the case is taken by the Court. For example, after listing the substantive questions raised by the Complaint *not yet before the Court,* the Brief states:

> "It *will* be the position of California on the merits of this important controversy that . . ." (Calif. Brief, p. 38).

Numerous other positions are sketched similarly in future tense (pp. 39, 46, 47, 51) and with such brevity that they cannot be taken as supportable without further elaboration in the due course of the litigation.

In these circumstances, California is surprised and dismayed that the Court should deny leave to file for substantive reasons going to the merits of the case.

California may have misjudged the willingness of the Court to treat Washington's objections to the Motion for Leave to File as a general demurrer on which the substantive law of the case could and would be

determined. As we have said, however, such a disposition is not reflected in the practice or the decisions of the Court in prior cases of this type by which, perforce, California has been guided in this litigation.

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3. THE PREJUDICE RESULTING FROM THE ORDER.

The Court is, of course, the final arbiter of the constitutional questions comprising the merits of this case. Moreover, its appellate jurisdiction reaches every court in the land, both state and federal. From this it follows that the substantive reasons given by the Court for the denial of its original jurisdiction will give the Court's Order a much different effect than would be the case had the denial been based, as it has in prior cases, on jurisdictional grounds.

Where the Court denies its original jurisdiction for jurisdictional reasons, there is no prejudice to the substantive position of the rejected plaintiff. Indeed, it is evident that the Court has upon occasion denied its original jurisdiction only to compel the plaintiff to utilize another forum for trial purposes (*Massachusetts v. Missouri, supra;* see *Georgia v. Pennsylvania R. Co., supra*). In such circumstances, the plaintiff is not substantively prejudiced in presenting his case to such other forum as may have jurisdiction to try the cause.

On the other hand, the Court having based its denial on substantive grounds, and having in mind the appellate jurisdiction of the Court, its Order has the undoubted effect of determining the law of the case

in every court throughout the Nation. The significance of this is even greater than might appear at first glance because of the *parens patriae* character of some of the causes of action alleged in California's Complaint. Numerous citizens of California, as well as the State, have suffered legal injury from the official acts of Washington complained of. These other potential plaintiffs may have access to the jurisdiction of the lower federal courts for the redress of their legal injuries (28 U.S.C. § 2281), even if the State of California does not (28 U.S.C. § 1251(a)(1)), and, in addition, there is the separate question of suit in the courts of the State of Washington.

From a practical viewpoint, however, these jurisdictional possibilities will be of no avail in the light of the substantive implications of the Court's Order herein.

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4. THE SUBSTANTIVE QUESTIONS ARE SO IMPORTANT THEY SHOULD NOT BE DECIDED WITHOUT FURTHER HEARING.

It is significant that *it was the Attorney General of California who presented to the Court the views which* it adopted in the leading case of *Young's Market.*[7]

California would be the last state in the Union to disagree with the view expressed by Mr. Justice Black that ". . . local, not national, regulation of the liquor traffic is now the general constitutional policy" (Con-

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[7]Cited by the Court in support of its Order herein, its full name is *State Board of Equalization of the State of California, et al. v. Young's Market Company, et al., supra.*

curring Opinion, *Carter v. Virginia,* 321 U. S. 131, 138 [1944]).

The position to be taken by California on the merits of this case is not a return to federalism. It does not involve any abridgment or limitation of the power of the several states under the Twenty-first Amendment to make importations of liquor conform to their respective and individually determined policies concerning liquor regulation.

This case concerns a rarity in the American economic system in the form of state ownership and state operation of a large commercial enterprise. The policies and the regulations laid down by the State of Washington for the conduct of its state-owned retail liquor stores have the force of law. It is that law whose constitutionality is challenged in this case.

This case presents for the first time the questions which the Court expressly reserved in *Young's Market* when it denied that its decision therein did not involve a declaration that the Twenty-first Amendment "freed the states from all restrictions upon the police power to be found in other provisions of the Constitution" (299 U. S. 59, 64).

Implicit in the Court's Order is the denial of civil rights guaranteed by the Constitution not previously considered by the Court. We submit that questions of such importance should not be decided summarily and without further consideration.

5. CONCLUSION.

If this Petition for Rehearing is granted, it will be the purpose of California to fully brief the Court on the merits of the substantive questions raised by the Complaint. This has not previously been done for the reasons heretofore stated. If it should have been done, then California prays the Court's indulgence.

Dated, San Francisco, California,
November 26, 1958.

Respectfully submitted,

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Attorneys for Plaintiff,
State of California.

CERTIFICATE

The undersigned, one of the attorneys for plaintiff in this proceeding, hereby certifies that the foregoing Petition for Rehearing is presented in good faith and not for delay.

WALLACE HOWLAND.

Certificate of Service

The undersigned, a member of the bar of the Supreme Court of the United States, and one of the counsel of record for the plaintiff, hereby certifies:

That on the 26th day of November, 1958, he served the within and foregoing "Petition for Rehearing on the Order of the Court Denying Leave to File the Complaint Herein" upon the State of Washington, the defendant, as prescribed by Rules 9 and 33 (par. 3(b)) of said Court:

He deposited in the post office at San Francisco, California, two copies of the said Petition for Rehearing, securely enclosed in an envelope, air mail postage prepaid, addressed to each of the following officials of said defendant State at his post office address, as shown below:

Honorable Albert D. Rosellini,
Governor of the State of Washington,
State Capitol,
Olympia, Washington.

Honorable John J. O'Connell,
Attorney General of the State of Washington,
State Capitol,
Olympia, Washington.

That at the same time he deposited in the same post office two further copies of the said Petition for Rehearing, similarly enclosed with air mail postage prepaid, addressed to each of the following officials of the

State of New York appearing as Amicus Curiae at his post office address as shown below:

Honorable Averell Harriman,
Governor of the State of New York,
The Capitol,
Albany 1, New York.

Honorable Louis J. Lefkowitz,
Attorney General of the State of New York,
The Capitol,
Albany 1, New York.

WALLACE HOWLAND.